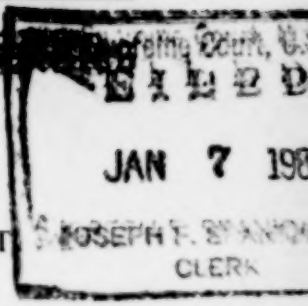
(7) (5) (5)

Nos. 87-253, 87-431, and 87-462

# In the Supreme Court of the United States

OCTOBER TERM, 1987




OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

*v.*

CHAN KENDRICK, ET AL.

---

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

*v.*

CHAN KENDRICK, ET AL.

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CHAN KENDRICK, ET AL., CROSS-APPELLANTS

*v.*

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

---

## BRIEF FOR THE APPELLANT

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## QUESTION PRESENTED

The Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.*, authorizes federal funds to support demonstration projects designed to discourage adolescent pregnancy and to provide care for pregnant adolescents. The question presented is whether the Act violates the Establishment Clause, either on its face or as applied, insofar as it requires applicants for funds to describe how they will, "as appropriate in the provision of services, * * * involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" (42 U.S.C. 300z-5(a)(21)(B)).

## PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmett W. Cocke, Jr., Shirley Pedler, Reverend Homer A. Goddard, Joyce Armstrong, John Roberts, and The American Jewish Congress were plaintiffs in the district court; and Sammie J. Bradley, Katherine K. Warner, and the United Families of America were defendants-intervenors in the district court.

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

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No. 87-253

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

*v.*

CHAN KENDRICK, ET AL.

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No. 87-431

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

*v.*

CHAN KENDRICK, ET AL.

---

No. 87-462

CHAN KENDRICK, ET AL., CROSS-APPELLANTS

*v.*

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

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## BRIEF FOR THE APPELLANT

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### OPINION BELOW

The opinion of the district court (J.S. App. 1a-46a) is reported at 657 F. Supp. 1547.[1] A subsequent order of the district court (J.S. App. 52a-55a) is unreported.

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[1] Unless otherwise indicated, citations to "J.S. App." refer to the Appendix to the Jurisdictional Statement in No. 87-431.

## JURISDICTION

The interlocutory order of the district court declaring the statute unconstitutional and enjoining the Secretary from enforcing it "as it pertains to 'religious organizations' " (J.S. App. 47a-49a) was entered on April 15, 1987. A notice of appeal to this Court from that order (J.S. App. 56a) was filed on May 15, 1987. On July 7, 1987, the Chief Justice extended the time within which to docket that appeal to and including August 13, 1987, and the appeal was docketed on that date as No. 87-253. The order of the district court declaring the statute's references to "religious organizations" to be severable from the balance of the statute, denying appellant's motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), and dismissing the case from the district court's docket, was entered on August 13, 1987 (J.S. App. 52a-55a). A notice of appeal to this Court from that order (J.S. App. 57a) was filed on August 20, 1987, and the appeal was docketed on September 14, 1987, as No. 87-431. A notice of cross-appeal to this Court from the August 13, 1987 order (87-462 J.S. App. 8a-9a) was filed on August 25, 1987, and the cross-appeal was docketed on October 19, 1987, as No. 87-462. On November 9, 1987, the Court noted probable jurisdiction in Nos. 87-253, 87-431, and 87-462, and consolidated the cases for argument. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.



42 U.S.C. 300z(a)(8)(B) provides in part:

> The Congress finds that [the problems of adolescent premarital sexual relations, pregnancy, and parenthood] * * * are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives.

42 U.S.C. 300z(a)(10)(C) provides in part:

> The Congress finds that services encouraged by the Federal Government should promote the involvement of parents with their adolescent children, and should emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations.

42 U.S.C. 300z-2(a) provides in part:

> Demonstration projects shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary associations.

42 U.S.C. 300z-5(a) provides in pertinent part:

> An application for a grant for a demonstration project for services under this subchapter shall be in such form and contain such information as the Secretary may require, and shall include—
>
> * * * * *

(21) a description of how the applicant will, as appropriate in the provision of services—

* * * * *

(B) involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives * * *.

## STATEMENT

### A. The Adolescent Family Life Act

1. The Adolecent Family Life Act (AFLA), 42 U.S.C. (& Supp. III) 300z *et seq.*, authorizes appropriations for demonstration grants to public and nonprofit entities for services and research in the area of premarital adolescent sexual relations and pregnancy (S. Rep. 97-161, 97th Cong., 1st Sess. 1 (1981)). When it enacted the AFLA in 1981, Congress found that pregnancy and childbirth, particularly among young adolescents, "often result[] in severe adverse health, social, and economic consequences" (42 U.S.C. 300z(a)(5)).[2] While prior legislation had made a "promising start" in addressing the social costs of adolescent pregnancy, Congress found that there "remain[ed] a substantial need for coordinated, comprehensive services" (S. Rep. 97-161, *supra,* at 6). It therefore sought to "[i]ncrease the flexibility of the program to provide services that address the twin problems of adolescent sexual

[2] In particular, Congress identified such risks as "a higher percentage of pregnancy and childbirth complications; a higher incidence of low birth weight; a higher frequency of developmental disabilities; higher infant mortality and morbidity; a decreased likelihood of completing schooling; a greater likelihood that an adolescent marriage will end in divorce; and higher risks of unemployment and welfare dependency" (42 U.S.C. 300z(a)(5)).



relations and pregnancy"—problems that Congress believed to be "multidisciplinary in nature" (*id.* at 8-9).

Among the objectives of the AFLA are "to promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations, including adolescent pregnancy"; "to promote adoption as an alternative for adolescent parents"; and "to establish innovative, comprehensive, and integrated approaches to the delivery of care services for pregnant adolescents" (42 U.S.C. (& Supp. III) 300z(b)(1), (2) and (3)).[3] To achieve these ends, AFLA funds are appropriated for projects that offer either "prevention services," which seek to discourage adolescent premarital sexual relations (see 42 U.S.C. 300z-1(a)(8)), or "care services," which provide care for pregnant adolescents and adolescent parents (see 42 U.S.C. 300z-1(a)(7)).[4] The statute also delineates certain "necessary services" that may be offered as part of prevention or care programs, including, among other things, pregnancy testing and maternity counseling (42 U.S.C. 300z-1(a)(4)(A)); adoption counseling and referral services (42 U.S.C. 300z-1(a)(4)(B)); primary and preventive health services including prenatal and postnatal care (42 U.S.C. 300z-1(a)(4)(C)); nutrition information and counseling (42

[3] In addition, the Secretary is required to give priority to applicants who "serve an area where there is a high incidence of adolescent pregnancy[,]" and who "serve an area with a high proportion of low-income families and where the availability of programs of care for pregnant adolescents and adolescent parents is low" (42 U.S.C. 300z-4(a)(1) and (2)).

[4] The AFLA also authorizes funds to support research projects concerning the societal causes and consequences of adolescent premarital sexual relations and pregnancy (see 42 U.S.C. 300z-7, 300z(b)(4), (5) and (6)). The present lawsuit does not challenge that portion of the statute (see J.S. App. 5a).

U.S.C. 300z-1(a)(4)(D)); educational services relating to family life (42 U.S.C. 300z-1(a)(4)(G)); consumer education and homemaking (42 U.S.C. 300z-1(a)(4)(L)); family planning services (42 U.S.C. 300z-1(a)(4)(P)); and referrals for screening and treatment of venereal disease (42 U.S.C. 300z-1(a)(4)(E)), pediatric care (42 U.S.C. 300z-1(a)(4)(F)), licensed residential care or maternity home services (42 U.S.C. 300z-1(a)(4)(I)), or mental or physical health services (42 U.S.C. 300z-1(a)(4)(J)).

The AFLA contains two principal restrictions on the use of appropriated funds. First, pursuant to Section 300z-3(b)(1), funds may not be used to provide family planning services, unless such services are not otherwise available in the community. This reflects Congress's determination that "money spent on birth control services under this program would divert resources from the purposes of the act" (S. Rep. 97-161, *supra,* at 13). Second, AFLA grants are limited "to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral, except that any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral" (42 U.S.C. 300z-10(a)). Congress concluded that "legislation, to foster alternatives to abortion, and to encourage adolescents to bring their babies to term, serves a critical national interest" (S. Rep. 97-161, *supra,* at 20).

2. In enacting the AFLA, Congress found that the complex problems of adolescent premarital sexual relations, pregnancy, and parenthood are best approached on several fronts. "Recognizing the limitations of Government in dealing with a problem that has complex moral and social dimensions" (S. Rep. 97-161, *supra,* at 15), Congress accordingly sought to draw, wherever possible,



on the accumulated resources and experience of existing institutions.

For example, in approving applications for grants, the Secretary is to give priority to applicants who "will utilize to the maximum extent feasible existing available programs and facilities such as neighborhood and primary health care centers" (42 U.S.C. 300z-4(a)(4)), and who "have involved the community to be served, including public and private agencies, adolescents, and families, in the planning and implementation of the demonstration project" (42 U.S.C. 300z-4(a)(7)). In applying for funds, prospective grantees must describe "existing pregnancy prevention services and programs of care" and state how the services they intend to furnish will be coordinated and integrated with other related programs and services (42 U.S.C 300z-5(a)(3) and (5)(A)). And applicants must also describe how they will identify and refer adolescents needing services other than those provided directly by the applicant (42 U.S.C. 300z-5(a)(6)).[5]

Consistent with this objective of establishing "better coordination, integration, and linkages" among existing community programs (42 U.S.C. 300z(b)(3)), the AFLA requires project applicants to describe how they will, "as appropriate in the provision of services[,] * * * involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" (42 U.S.C 300z-5(a)(21)). Congress determined that such broad-based community involvement would "help guarantee" the program's ultimate success (S. Rep. 97-161, *supra,* at 15), and it believed that "nonprofit religious organizations

[5] The Secretary is also to give priority to applicants who "can demonstrate a community commitment to the program by making available to the demonstration project non-Federal funds, personnel, and facilities" (42 U.S.C. 300z-4(a)(6)).

have a role to play in the provision of services to adolescents" (*id.* at 16). Congress also emphasized that "[r]eligious affiliation is not a criterion for selection as a grantee" (*ibid.*), but concluded that "promoting the involvement of religious organizations in the solution to these problems is neither inappropriate or illegal" (*ibid.*).[6]

3. Since passage of the AFLA in 1981, the Secretary has received 1,088 applications for grants and has awarded 141 grants. In the current grant cycle alone, the Secretary has received more than 400 applications and has made 37 new federal grant awards. The government presently funds 82 projects at an overall cost of approximately $10 million, and in issuing its grants it routinely informs funded projects that they may not use the funds to inculcate religion (see, *e.g.*, J.A. 757, 759, 761).

AFLA grantees cover a broad spectrum. There have been grants, for example, to state and county health departments, such as the Hawaii Department of Health, the Guam Department of Public Health and Social Services, and the Lyon County Health Department in Emporia, Kansas; colleges and universities, such as the School of Public Health at the University of South Carolina, the University of Utah, Emory University, and Gallaudet College; school districts, such as Tucson United School District No. 1 in Tucson, Arizona, and Mt. Vernon Public Schools in Mt. Vernon, New York; hospitals, such as Family Hospital in Milwaukee, Memorial General Hospital Association of Elkins, West Virginia, and St. Mary's Hospital in Kansas City; community health associations, such as the SeMo Association of Public Health Administrators in Missouri; privately-operated

[6] Congress noted that under Title VI of the Health Services and Centers Amendments of 1978, Pub. L. No. 95-626, 92 Stat. 3595, the predecessor to AFLA, the Secretary had awarded grants to several religiously-affiliated organizations. S. Rep. 97-161, *supra*, at 16.



health care centers, such as the Charles Henderson Center in Troy, Alabama; and community and charitable organizations, such as Father Flanagan's Boys Home in Omaha, Hull House of Chicago, Covenant House of New York City, Catholic Family Services of Amarillo and YWCA's in Salem, Oregon and St. Petersburg, Florida.

The programs funded by the AFLA over its history reflect the integration of community services that Congress sought to achieve.[7] Tucson Unified School District No. 1, for example, served as the anchor agency for the Pima Associated Services for Adolescent Family Education project (PASAFE). The agencies involved in the PASAFE program made available hundreds of filmstrips, books, pamphlets, booklets and other materials for teens, parents, and others on topics such as self-respect, stress, alcohol and teenagers, parents as sex educators, marriage, decisionmaking, biology, menstruation, human reproduction, family violence, prenatal care, child care, single-parent families, parenting, childbirth, choosing doctors, child development, nutrition, and baby foods. J.A. 487, 714-717. The School District also operated the Teenage Parent Program, an alternative school for pregnant and parenting youth (J.A. 486, 714-716). In addition, it contracted with a number of metropolitan based organizations, several of which are religiously affiliated, to provide a comprehensive program of health, social, and educational services to teens. Among the organizations were three health agencies: Pascua Yaqui Tribe Health Department, St. Elizabeth of Hungary Clinic, and El Rio Santa

[7] Because AFLA projects may be funded for no more than a five-year period (42 U.S.C 300z-4(c)(1)), all but one of the projects as to which evidence was submitted (including the projects listed here and those cited by the district court) are no longer funded. We mention these projects as typical of those that have been or are currently being funded under the Act.

Cruz Health Center; and three family social service agencies: Catholic Social Service, Jewish Family Service and Arizona Children's Home. *Ibid.*

The Camden County Adolescent Family Life Program of Camden County, New Jersey, served a wide range of different communities, ranging from the city of Camden—which has been rated by the Brookings Institute as the ninth most distressed city in the nation—to very affluent communities. See *Pregnancy-Related Health Services: Hearings Before the Subcomm. on Health and the Environment of the Comm. on Energy and Commerce,* 99th Cong., 1st Sess. 126 (1985) (statement of Ruth W. Salmon). Camden County provided both prevention and care services. It furnished information directly to adolescents through a variety of approaches, including workshops; it provided consultation to schools in the development of their curricula relating to family life; it trained school teachers on family life education; and it conducted a workshop for parents entitled "Communicating With Your Child About Sexuality." *Id.* at 127, 133-134. During fiscal year 1984, these prevention programs served 2790 youths, 409 parents, and 688 educators (*id.* at 134). Camden County's clinical programs attempted to prevent repeat pregnancies among already pregnant teenagers and to provide prenatal services that ensure the health of both mother and child (*id.* at 127). There was special focus on youth who bear a higher risk of adolescent pregnancy, such as youth who have been incarcerated and the siblings of already pregnant teens (*ibid.*). During fiscal year 1984, Camden County served 812 pregnant teens, 44 nonpregnant teens, 623 teen mothers, 290 infants of teen mothers, 425 male partners, and 909 extended family members in its care services program (*id.* at 136).

Catholic Family Services of Amarillo, Texas (CFS), operated a combined care and prevention program under AFLA. Care services provided by CFS included pregnancy counseling and testing, adoption services, pre- and post-



natal medical care, child care, family planning information and referral services, consumer education, and educational and vocational counseling. Prevention services included presentations on teen sexuality and decision-making for adolescents and their families, courses for parents on educating their children about sex, and counseling for sexually active adolescents and their families. J.A. 446, 447, 710-712. CFS had service agreements with state, county and municipal health agencies; county probation departments; Texas Tech University; Amarillo Public System; and Planned Parenthood (J.A. 447-448, 694-695). As part of its community outreach program, CFS made presentations on teenage sexuality and services available under the AFLA program at public and parochial schools, hospitals, churches, civic groups, colleges, public libraries, county courthouses and television and radio stations (J.A. 448-449, 694).

**B. The Present Controversy**

1. Appellees, a group of taxpayers, clergymen, and the American Jewish Congress, brought this action to enjoin the enforcement of the care and prevention services provisions of the AFLA, claiming that the Act violates the Religion Clauses of the First Amendment. On April 15, 1987, the district court granted summary judgment in appellees' favor (J.S. App. 1a-49a), declaring the Act unconstitutional, on its face and as applied, "insofar as religious organizations are involved in carrying out the programs and purposes of the Act" (*id.* at 48a).

The court first considered the nature of facial and as-applied challenges under the Establishment Clause and observed that the distinction between them "has not been clearly delineated" in this Court's decisions (J.S. App. 4a). It concluded that a statute must be struck down on its face even if a particular application of the statute "is the only constitutionally offensive element to which the court has

pointed" (*ibid.*). Proceeding to apply the three-part test of *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), the court found that the AFLA has a valid secular purpose (J.S. App. 17a-22a), but that it has the primary effect of advancing religion, and that it promotes excessive entanglement.[8]

With regard to the primary effect test, the court stated that "[w]here the connection between a statute and religion is apparent from the face of the statute," one need only inquire whether the effect of the statute in advancing religion is "direct and immediate" rather than "remote or incidental" (J.S. App. 23a-24a). Only "where the connection to religion is not apparent on the face of the statute or from the nature of the government act itself," must a court consider whether the beneficiary of that action is pervasively sectarian (*id.* at 24a). The court stated that where the effect on religion is not direct and immediate, and the affected entity is not pervasively sectarian, a court must further inquire whether the statute nonetheless funds a specific religious activity (*ibid.*).

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[8] As a preliminary matter, the court rejected appellant's argument that appellees lack standing to challenge the constitutionality of the statute as applied (J.S. App. 8a-12a). See n. 24, *infra.* The court also rejected appellees' argument that the statute should be reviewed under the strict scrutiny standard set forth in *Larson* v. *Valente,* 456 U.S. 228 (1982) (J.S. App. 13a-15a), rather than under the three-part test of *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971).

Thereafter, in finding a valid secular purpose, the court found that "the AFLA was motivated by Congress' concern that teenage pregnancy and premarital sexual relations are very damaging to society and, particularly, to adolescents" (J.S. App. 17a-18a (footnote omitted)). Moreover, the court observed (*id.* at 20a (emphasis in original)) that the mere fact that this secular purpose "coincide[s] or conflict[s] with religious tenets does not transform [it] into [a] sectarian purpose[] motivated *wholly* by religious considerations." "Religious organizations," the court concluded (*id.* at 21a-22a), "can play a vital role in furthering secular values."



Applying this test—which the court acknowleged was "put more neatly than the many decisions which form its base" (J.S. App. 25a)—the court first held that the statute, on its face, has a primary effect of advancing religion (*id.* at 27a-32a). It examined the text and legislative history of the AFLA (*id.* at 27a-28a) and found that the statute "explicitly permits religious organizations to be grantees and envisions a direct role for those organizations in the education and counseling components of AFLA grants" (*id.* at 28a). Applying the analysis it had devised, the court therefore inquired whether the statute "directly and immediately" advances religion, and it concluded that it does. The court reasoned that AFLA programs involve "*teaching* by grant recipients and subcontractors * * * about the harm of premarital sexual relations and the factors supporting a choice of adoption rather than abortion, and these matters are fundamental elements of religious doctrine" (*ibid.* (emphasis in original)). Moreover, the court observed, "the AFLA contains no restriction whatsoever against the teaching of religion *qua* religion" (*id.* at 29a).[9] The court concluded that by subsidizing a fundamentally religious mission and thereby creating a "crucial symbolic link" between government and religion, the AFLA on its face has a primary effect of advancing religion (*id.* at 30a-32a).

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[9] The court acknowledged that the Secretary's " 'Notice of Grant Award' specifies that grants may not be used to 'teach or promote religion,' " but it held that this was "merely an unpublished administrative warning that was written at agency discretion and can be revoked by agency fiat." The court stated that it was "also aware that defendant claims that HHS officials verbally advised grantees that they may not use AFLA funds to teach religion." It concluded, however, that "[e]ven if true, the fact that HHS warnings may undo some of the statute's damage does not solve the problem with the statute itself, and it is with the statute alone that a facial inquiry is concerned." J.S. App. 29a n.13.

The district court next held (J.S. App. 32a-38a) that the statute, as applied, has a primary effect of advancing religion because grants in practice have been made to "religious organizations." Declining to "engage in an exhaustive recitation of the record" (J.S. App. 33a), the court discussed several instances of what it found to be objectionable use of grant funds (*id.* at 33a-38a).[10] The court found (*id.* at 34a-35a) that ten grantees or subgrantees "were themselves 'religious organizations' in the sense that they have explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine." The court also noted (*id.* at 33a) that other grantees, "while not explicitly affiliated with a religious denomination, are religiously inspired and dedicated to teaching the dogma that inspired them." And the court found that several AFLA programs took place at sites adorned with religious symbols and were administered by members of religious orders, thereby causing participants in the programs to "believe[] that these federally funded programs were also sponsored by the religious denomination" (*id.* at 37a). The court did not find that any of the participating organizations were "pervasively sectarian."

Finally, the district court held (J.S. App. 39a-43a) that the statute engenders excessive government entanglement with religion. Without distinguishing among the various types of "religious organizations" involved here, including universities, hospitals, maternity homes, and YWCAs, the court surmised that "the risk that AFLA funds will be used

[10] For example, the district court identified (J.S. App. 37a) one grantee that had "attempted to evade restrictions [on] * * * religious teaching, by establishing programs in which an AFLA-funded staffer's presentations would be immediately followed, in the same room and in the staffer's presence, by a program presented by a member of a religious order and dedicated to presentation of religious views on the subject covered by the AFLA staffer."



to transmit religious doctrine can be overcome only by government monitoring so continuous that it rises to the level of excessive entanglement" (*id.* at 40a). And it found that the AFLA's funding of one-on-one counseling of impressionable adolescents substantially aggravates this problem (*id.* at 42a-43a).[11]

The district court therefore declared the AFLA unconstitutional and enjoined its enforcement insofar "as it pertains to 'religious organizations' " (J.S. App. 48a). On May 22, 1987, the district court issued an order staying the effect of its judgment until September 30, 1987, insofar as it pertains to current grantees (*id.* at 50a-51a). On August 10, 1987, the Chief Justice issued an order (No. A-99) granting a stay pending appeal.

2. On August 13, 1987, the date on which the Secretary docketed his appeal (No. 87-253) from the district court's interlocutory order, the district court entered a final judgment in the case (J.S. App. 52a-55a).[12] In that judgment, the district court held that the AFLA's references to "religious organizations" are severable from the balance of the statute. Examining the language and legislative history of the statute, the district court con-

[11] The district court also found (J.S. App. 44a) that the statute would "tend to incite political division along religious lines" because AFLA programs involve "sensitive issues upon which religions' fundamental beliefs differ." Moreover, the court believed that such division would be "recurring and intensified" (*ibid.*) because appropriations under the Act are made annually. The court acknowledged, however, that political divisiveness has never been the only ground for holding a statute unconstitutional (*id.* at 43a), and stated that "the political division caused by the AFLA may not be sufficient to invalidate it" (*id.* at 44a).

[12] Although the district court did not enter its final judgment "on a separate document" (Fed. R. Civ. P. 58), the August 13, 1987, order was evidently intended as the district court's final judgment since it "ordered that this case is dismissed from the docket of this Court" (J.S. App. 55a).

cluded (*id.* at 54a) that "Congress would have enacted the AFLA without its reference to 'religious organizations,' " and that "the AFLA is fully and constitutionally operative as law in a manner consistent with the intent of Congress absent its references to 'religious organizations.' "

In the August 13, 1987 judgment, the court also denied the Secretary's Rule 59(e) motion to clarify which grantees were "religious organizations" within the meaning of the court's injunction (J.S. App. 54a-55a). It stated (*id.* at 54a) that it was "puzzled" by the Secretary's request that it "define the term 'religious organization,' " and it found (*id.* at 55a) that "the language of the [April 15, 1987] Order is clear" on that point. The court also stated (*ibid.*) that "[t]here is * * * ample precedent in numerous statutes and federal regulations defining the term 'religious organizations.' "

## INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the AFLA to address the "severe adverse health, social, and economic consequences" associated with adolescent pregnancy (42 U.S.C. 300z(a)(5)). It recognized, however, that the problem was "multidisciplinary in nature" (S. Rep. 97-161, *supra,* at 9), with "complex moral and social dimensions" (*id.* at 15), and it therefore sought to draw support from a wide array of community groups, including "religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" (42 U.S.C. 300z-5(a)(21)). By explicitly permitting religious groups, among others, to assist in providing AFLA services, Congress recognized that nonprofit religious organizations can play an important role in delivering care and prevention services to adolescents (see S. Rep. 97-161, *supra,* at 16).

In so doing, Congress broke no new ground. For nearly a century, governments and religious groups have cooperated in providing social services to the community.[13] "[R]eligion has been closely identified with our history and government," this Court observed in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 212 (1963), and it is therefore "inevitable that the secular interests of Government and the religious interests of various sects and their adherents will frequently intersect * * * and combine." *Wallace* v. *Jaffree,* 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring). And because religion shares with government a common concern with social welfare, the government has never been barred from "acknowledging religion or from taking religion into account in making law and policy" (*ibid.*). Together, governments and religiously affiliated groups have tended to the needs of the sick,[14] the orphaned,[15] delinquent adolescents,[16] and the poor.[17] And in recent years, religious organizations have par-

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[13] See Pickrell & Horwich, *"Religion as an Engine of Civil Policy": A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field,* 44 Law & Contemp. Probs. 111, 112-114 (1981); B. Coughlin, *Church and State in Social Welfare* 15-43 (1965); A. Reichley, *Religion in American Public Life* 168-339 (1985).

[14] *Bradfield* v. *Roberts,* 175 U.S. 291 (1899); *Washington Health Care Facilities Auth.* v. *Spellman,* 96 Wash. 2d 68, 633 P.2d 866 (1981); *Abernathy* v. *City of Irvine,* 355 S.W. 2d 159 (Ky. 1961, cert. denied, 371 U.S. 831 (1962); *Craig* v. *Mercy Hosp.—Street Memorial,* 209 Miss. 427, 45 So.2d 809 (1950); *Kentucky Bldg. Comm'n* v. *Effron,* 310 Ky. 355, 220 S.W.2d 836 (1949).

[15] *Sargent* v. *Board of Educ. of Rochester,* 177 N.Y. 317, 69 N.E. 722 (1904); *Murrow Indian Orphans Home* v. *Childers,* 197 Okla. 249, 171 P.2d 600 (1946).

[16] *Schade* v. *Allegheny County Inst. Dist.,* 386 Pa. 507, 126 A.2d 911 (1956); *Dunn* v. *Chicago Indus. School for Girls,* 280 Ill. 613, 117 N.E. 735 (1917).

[17] *Community Council* v. *Jordan,* 102 Ariz. 448, 432 P.2d 460 (1967).

ticipated in a variety of programs funded by state and federal governments—programs that, according to one commentator, have included such varied (and secular) enterprises as "hospitals, soup kitchens, drug abuse programs, orphanages, emergency shelters, nursing homes, family planning services, higher education, housing, job training, economic development, refugee resettlement, Head Start, tutoring, mental health programs, arts and humanities projects, school lunches, and foreign disaster relief." McConnell, *Political and Religious Disestablishment,* 1986 B.Y.U. L. Rev. 405, 421.[18]

Two factors, among others, may account for this historical partnership. The first is the intrinsic connection between religious doctrine and social service. For many religious persons, the call of faith is also a call to service. Religious persons have for that reason traditionally been drawn to social action on behalf of the needy. B. Coughlin, *Church and State in Social Welfare* 21, 28-35,

[18] See, *e.g.*, 42 U.S.C. (Supp. IV) 622, as amended by Pub. L. No. 96-272, § 103(a), 94 Stat. 516 (Title IV-B of Child Welfare Services); 42 U.S.C. (1976 ed.) 630-644 (Work Incentive Program), (as implemented according to 45 C.F.R. 224.30(c)(1) (1980)); 42 U.S.C. (1976 ed.) 1397a (Title XX Day Care Services under Social Security Act); 42 U.S.C. (1976 ed.) 2931-2932 (Head Start); Disaster Relief Act of 1974, Pub. L. No. 93-288, § 312, 88 Stat. 150; Juvenile Delinquency Prevention and Control Act of 1968, Pub. L. No 90-445, § 102, 82 Stat. 463; Social Security Amendments of 1967, Pub. L. No. 90-248, § 301, 81 Stat. 821 (amending Title V of the Social Security Act, Maternal and Child Health and Crippled Children's Services); Housing Act of 1961, Pub. L. No. 87-70, § 101, 75 Stat. 149 (amending National Housing Act § 221(d)(3), 12 U.S.C. 1715*l*(d)(3)); Housing Act of 1959, Pub. L. No. 86-372, § 202, 73 Stat. 667; See also *Bill to Provide for Judicial Review of the Constitutionality of Grants or Loans Under Certain Acts: Hearings on S.2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. 699-716 (1968) (summary of federal programs under which religious organizations may receive assistance).



38-43 (1965); Pickrell & Horwich, *"Religion as an Engine of Civil Policy": A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field,* 44 Law & Contemp. Probs. 111, 112 (1981). Second, and as a result, religious organizations have over time developed an extensive infrastructure for delivering social services to the community. See *Pickrell & Horwich, supra,* 44 Law & Contemp. Probs. at 112; A. Reichley, *Religion in American Public Life* 219-220 (1985). Well-established charitable arms of religious groups provide food, clothing and shelter to the needy, and like other charitable organizations have done so in partnership with government for many years.

The district court, however, found that partnership to be unconstitutional in the context of the AFLA care and prevention programs. Without stopping to inquire whether particular religiously affiliated organizations were "pervasively sectarian"—so that "a substantial portion of their functions are subsumed in the religious mission," *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973)—the court found the AFLA objectionable because it had a "direct and immediate" effect of advancing religion. Among its other objectives, the statute funds teaching and counseling on issues that, for some, are matters of religious faith, and the court found it "simply unrealistic" "[t]o presume that AFLA counselors from religious organizations can put their beliefs aside when counseling an adolescent on matters that are part of religious doctrine" (J.S. App. 30a).

But it is the district court, and not Congress, that has applied an unwarranted "presumption." The court presumed, at bottom, that no religious person can deliver the AFLA care and prevention services without inculcating religious doctrine. The court thereby applied to all "religious organizations" principles that have been developed uniquely for "pervasively sectarian" institutions

such as parochial schools. The district court thereby misapplied the three-part test articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602 612-613 (1971), and reached a result inconsistent with the Court's Establishment Clause jurisprudence and two centuries of history.

A. The AFLA has a clearly secular purpose, as the district court correctly found (J.S. App. 19a). The text and legislative history confirm that Congress sought to address "the problems caused by teenage pregnancy and premarital sexual relations" (*ibid.*). That plainly secular purpose, moreover, is not pretextual simply because a prior statute, supplanted by the AFLA, did not explicitly advert to the role of religious organizations in the delivery of services.

B. The primary effect of the statute, on its face and as applied, neither advances nor inhibits religion. This Court has explained that such an impermissible effect may be found either where government aid flows to a "pervasively sectarian" institution, or where it assists a "specifically religious activity in an otherwise substantially secular setting" (*Hunt* v. *McNair*, 413 U.S. 724, 743 (1973)). Because it applied a quite different "direct and immediate" test, the district court made no such findings in this case.

The court's failure to consider the central distinction in this Court's cases between "pervasively sectarian" institutions (which often are disabled from participating in government programs) and other religiously affiliated institutions (which ordinarily may participate on an equal footing) impairs both the facial and as-applied analysis of the statute. The court's facial analysis of the statute fails because it effectively presumes that all "religious organizations" are alike and that none can be expected to deliver the AFLA services in a lawful, secular manner. The court's as-applied analysis is similarly flawed, since it never comes to grips with the significant variations in nature and purpose among the individual AFLA grantees. Finally, the



court also made no inquiry as to whether the AFLA provides funds to specifically religious activity within an otherwise secular setting. On this record, however, no such findings could have been made.

C. The AFLA does not require excessive entanglement with religion. This Court has never applied the entanglement doctrine outside the special setting of pervasively sectarian institutions. Two reasons account for that result: first, outside the context of a pervasively sectarian grantee, monitoring by the government to ensure compliance with the terms of a grant is simple monitoring, the kind of oversight that occurs every day in the context of a great many government grant programs; and second, there is little or no basis for presuming that religiously affiliated organizations that are not pervasively sectarian will provide otherwise secular services in a forbidden, non-secular manner. In once more failing to distinguish between "pervasively sectarian" and other "religious organizations," the district court misapplied the entanglement doctrine.

## ARGUMENT

### THE ADOLESCENT FAMILY LIFE ACT DOES NOT, EITHER ON ITS FACE OR AS APPLIED, VIOLATE THE ESTABLISHMENT CLAUSE

The Court has generally applied the three-part test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971) (citations omitted), in evaluating Establishment Clause challenges to governmental action: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' " Accord *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, No. 86-179

(June 24, 1987), slip op. 7-11; *Grand Rapids Sch. Dist.* v. *Ball*, 473 U.S. 373, 382-383 (1985).[19] The AFLA satisfies each of these requirements.

### A. *The AFLA Has a Secular Legislative Purpose*

"The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated *wholly* by religious considerations." *Lynch* v. *Donnelly*, 465 U.S. 668, 680 (1984) (emphasis added). Indeed, "[e]ven where the benefits to religion were substantial," the Court has found "a secular purpose and no conflict with the Establishment Clause" (*ibid.*). Accord *Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985). Moreover, in discerning the purpose for governmental action, the Court "is normally deferential to a [legislature's] articulation of a secular purpose" (*Edwards* v. *Aguillard*, No. 85-1513 (June 19, 1987), slip op. 7), and is "reluctan[t] to attribute unconstitutional motives to [Congress], particularly when a plausible secular purpose for the * * * program may be discerned from the face of the statute." *Mueller* v. *Allen*, 463 U.S. 388, 394-395 (1983).[20] The district court applied those principles and correctly concluded (J.S. App. 19a) that AFLA has the clearly secular purpose of addressing "the problems caused by teenage pregnancy and premarital sexual relations."

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[19] At the same time, the Court has stated that these criteria "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek* v. *Pittenger*, 421 U.S. 349, 359 (1975). Accord *Lynch* v. *Donnelly*, 465 U.S. 668, 678-679 (1984); *Mueller* v. *Allen*, 463 U.S. 388, 394 (1983).

[20] See, *e.g.*, *Committee for Pub. Educ. and Religious Liberty* v. *Regan*, 444 U.S. 646, 654 (1980); *Meek* v. *Pittenger*, 421 U.S. 349, 363 (1975); *Committee for Pub. Educ.* v. *Nyquist*, 413 U.S. 756, 773 (1973); *Sloan* v. *Lemon*, 413 U.S. 825, 829-830 (1973); *Hunt* v. *McNair*, 413 U.S. 734, 741-742 (1973); *Levitt* v. *Committee for Pub. Educ.*, 413 U.S. 472, 479 n.7 (1973); *Tilton* v. *Richardson*, 403 U.S. 672, 678-679 (1971); *Lemon* v. *Kurtzman*, 403 U.S. at 613; *Board of Educ.* v. *Allen*, 392 U.S. 236, 243 (1968).



The stated purposes of the AFLA (42 U.S.C. (& Supp. III) 300z(b)) are "to promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations, including adolescent pregnancy"; "to promote adoption as an alternative for adolescent parents"; "to establish innovative * * * approaches to the delivery of care services for pregnant adolescents"; to encourage research on "the societal causes and consequence of adolescent premarital sexual relations, contraceptive use, pregnancy, and child rearing"; "to support evaluative research" that may help "alleviate * * * any negative consequences of adolescent premarital sexual relations and adolescent childbearing"; and "to encourage * * * the dissemination of results" from the funded programs.

To be sure, the AFLA permits religious organizations to participate in funded programs, but only among a wide range of community groups whose combined efforts would "help guarantee the ultimate success of the[] program by ensuring the early involvement of State, local and private entities in the funding and support of the[] program" (S. Rep. 97-161, *supra*, at 15). By recognizing that "nonprofit religious organizations have a role to play in the provision of services to adolescents" (*id.* at 16), Congress promoted, rather than undermined, the unquestionably secular purposes of the Act.

Appellees contended below, however, that the stated purposes of the statute are pretextual. In their view, the fact that Congress substituted the AFLA for the Health Services and Centers Amendments of 1978, Pub. L. No. 95-626, Tit. VI, 92 Stat. 3595, and added, inter alia, an ex-

plicit reference in the statute to religious organizations, demonstrates that the Act lacks a secular purpose. The district court correctly rejected that claim (J.S. App. 20a-22a).

First, by permitting religious organizations to participate in the delivery of services, Congress did not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, No. 86-179 (June 24, 1987), slip op. 7. Quite the contrary, it sought to ensure that funded projects take account of an important social reality: that "religious organizations can play a vital role in furthering secular values" (J.S. App. 21a-22a). Congress included religious organizations simply as one participant among "a wide array of educational, health, and supportive services" (42 U.S.C. 300z(a)(9)) whose combined efforts were required to deliver secular services to adolescents in need.[21]

Furthermore, as the court noted (J.S. App. 21a), "Title VI was amended not only to add religious organizations to the list of entities that may participate in AFLA programs, but also to add families, charitable organizations, voluntary associations and other groups." It was amended in other ways as well, including the addition of a program of research grants. See 42 U.S.C. 300z-7. It cannot be said,

[21] The district court was also correct in rejecting (J.S. App. 19a-20a n.11) the claim that the articulated purposes of the statute are pretextual because Congress could have achieved its ends without including religious organizations. That claim is mistaken in fact, since Congress explicitly determined that religious groups are peculiarly able to play an important role in the delivery of secular services to the community. See S. Rep. 97-161, *supra*, at 16. But the claim is also legally irrelevant. The question is not whether the government's "objectives could have been achieved without including [religious organizations]"; rather, "[t]he question is whether [including them] * * * violates the Establishment Clause" (*Lynch* v. *Donnelly*, 465 U.S. at 681 n.7).



therefore, that the law was changed *solely* to ensure the participation of religious organizations in funded programs.[22]

**B. The Primary Effect of The AFLA Neither Advances Nor Inhibits Religion**

In *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973), the Court articulated the standard for assessing "primary effect" under the Establishment Clause:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

Accord, *e.g.*, *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. 736, 752, 755 (1976) (plurality opinion). See also *Grand Rapids Sch. Dist.* v. *Ball*, 473 U.S. at 388 (found impermissible effect, citing "pervasively sectarian environment of a religious school"); *Meek* v. *Pittenger*, 421 U.S. at 371 (found impermissible effect where "education is an integral part of the dominant sectarian mission" and "atmosphere dedicated to the advancement of religious belief is constantly maintained"). The district court, however, did not apply that standard and therefore did not inquire either as to the pervasively sectarian nature of the AFLA

[22] The present case is in that sense distinguishable from *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), where a state statute authorizing a period of silence in public schools for "meditation or voluntary prayer" was found to lack a secular purpose, in part because it had replaced an earlier statute that already authorized a period of silence simply for "meditation." The Court noted (*id.* at 59) that in authorizing "voluntary prayer" in addition to "meditation," the later statute could only have been "enacted to convey a message of State endorsement and promotion of prayer," in violation of the Establishment Clause.

grantees or as to the funding of specifically religious activities. Instead, the court proposed a novel standard (J.S. App. 25a): "If the connection between religion and the challenged government statute or practice is clear from the face of the statute, the Court must determine whether that statute has the 'direct and immediate' effect of advancing religion." Examining the text and legislative history of the statute, the court found that there was a "clear connection between religious organizations and the federally funded AFLA programs" and it therefore applied the " 'direct and immediate' effect analysis" (*id.* at 28a). That test was met in this case, the court concluded, because the statute authorizes funding to teach and counsel on matters closely related to religious beliefs, and the court was unwilling to presume that counselors in that situation "can put their beliefs aside" (*id.* at 30a).

It is the district court, however, and not Congress, that has indulged an unwarranted presumption—that any "religious organization," regardless of its nature or purposes, will be driven by religious beliefs to violate the terms of its AFLA grant by inculcating religion. The Court's cases make clear that absent an initial determination that a particular recipient of assistance is "so permeated by religion that the secular side cannot be segregated from the sectarian" (*Roemer*, 426 U.S. at 759) religiously affiliated organizations may participate fully in governmental programs. Only by presuming otherwise could the district court strike down the statute on its face. And that presumption impaired the court's as-applied analysis as well, since it distracted the court from undertaking the intensive examination of the sectarian nature of the individual grantees that is required by this Court's cases. Finally, the effect of the court's approach, as demonstrated by its decision in this case, is to draw a line of separation that excludes from major areas of national life all organizations and undertakings that maintain any religious affiliation or allegiance.



1. a. This Court's cases involving government funding programs make clear that the heart of any Establishment Clause analysis is whether the assisted organizations are pervasively sectarian in nature. The critical importance of that inquiry is best reflected in the crisp distinction drawn by this Court between primary and secondary parochial schools, whose mission often disables them from receiving governmental assistance, and other religiously-affiliated organizations, which are ordinarily free to participate in government programs on an equal footing. The Court has observed that in parochial schools, education and counseling are "integral part[s] of the dominant sectarian mission * * * in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Meek* v. *Pittenger*, 421 U.S. 349, 371 (1975). The Court has emphasized that in a parochial school setting "[r]eligious authority necessarily pervades the school system," and that it is the "substantial religious character of * * * church-related schools" (*Lemon* v. *Kurtzman*, 403 U.S. at 616-617), that requires the Court to be "particularly vigilant" (*Edwards* v. *Aguillard*, No. 85-1513 (June 19, 1987), slip op. 4). The "danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular" is a "conflict of functions [that] inheres in the situation" (*Lemon* v. *Kurtzman*, 403 U.S. at 617). Put another way, "where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct." *Wolman* v. *Walter*, 433 U.S. 229, 254 (1977). See also *Grand Rapids Sch. Dist.* v. *Ball*, 473 U.S. 373, 384-385, 391-392 (1985); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 501-504 (1979).[23]

[23] The Court's vigilance in connection with aid to primary and secondary schools is additionally justified by the fact that the government has made primary education compulsory, making children whose parents select religious schools nearly a captive audience for as many hours as they are required to attend.

But there are a great many "religious organizations"—such as the hospitals and maternity homes providing care to pregnant teenagers here—that are fully capable of discharging their services without permitting "ideological content * * * [to] creep in[ ]" (*Grand Rapids Sch. Dist.*, 473 U.S. at 389). "[T]he proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected" (*Hunt* v. *McNair*, 413 U.S. at 742). Indeed, the Court has upheld government aid to such religiously affiliated institutions as colleges and hospitals, where the aid might indirectly advance the religious mission, but where the institution itself was not "pervasively sectarian" in nature.

The leading cases have involved religiously affiliated colleges, where the Court has upheld government aid that was used for other than "specifically religious activity." See *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. 736, 740-741, 759 (1976) (noncategorical grants to private colleges for other than "sectarian purposes"); *Hunt* v. *McNair*, 413 U.S. 734, 739 (1973) (state statute authorizing issuance of revenue bonds for construction of private college or university facilities "not to be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity"); *Tilton* v. *Richardson*, 403 U.S. 672, 675 (1971) (federal construction grants for private college or university facilities not "to be used for sectarian instruction or as a place of worship * * * or to be used primarily in connection with any part of the program of a school or department of divinity"). In these cases, the Court was not troubled, as the district court was here, by the fact that the institutions were religiously affiliated, or that there were various indicia of that affiliation present in the day-to-day operations of the schools. Rather, the Court made clear that if, when viewed in its entirety, an institution is not "so permeated with religion that the secular side can not be separated from the sectarian" (*Roemer*, 426



U.S. at 759), then governmental aid does not become impermissible due simply to church affiliation or control (*Hunt*, 413 U.S. at 743; *Tilton*, 403 U.S. at 686); the inclusion in the curriculum of matters of religious doctrine (*Tilton*, 403 U.S. at 680), or even compulsory courses on such subjects, (*Roemer*, 426 U.S. at 756); the employment by the university of clerics as teachers or in other positions (*Roemer*, 426 U.S. at 755); or the presence of prayer or religious practice as an integral part of university life (*id.* at 755-756). Provided that the assistance is not itself being used to advance an explicitly sectarian aspect of the institution's activities, it is clear under these cases that no impermissible effect of aiding religion arises where the institutions assisted are not pervasively sectarian. *Roemer*, 426 U.S. at 759; *Hunt*, 413 U.S. at 744; *Tilton*, 403 U.S. at 680-681.

The Court made much the same point in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), in upholding a grant of $30,000 to a hospital to be used for the construction of buildings. The hospital, which was operated by a sisterhood of the Roman Catholic Church, had previously been incorporated by an act of Congress, giving the hospital the power to provide "for the care of such sick and invalid persons as may place themselves under the treatment and care of the said corporation." Act of Apr. 8, 1864, ch. 50, § 2, 13 Stat. 44. The Court held that although the hospital was "conducted under the auspices of the Roman Catholic Church," which "exercise[d] great and perhaps controlling influence over the management of the hospital," the hospital's charter was limited to the purpose of operating a hospital (175 U.S. at 298). See *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. at 746. Because the charter ensured that the hospital's mission was not fundamentally religious, the Court refused to inquire into "the individual beliefs upon religious matters of the various incorporators" (175 U.S. at 298). Even though "the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation," the

Court stated, such influence was "surely not sufficient to convert such a corporation into a religious or sectarian body" (*ibid.*).

b. The district court thus made a critical error in failing to begin its inquiry "with a consideration of the nature of the institutions in which the programs operate" (*Grand Rapids Sch. Dist.* v. *Ball,* 473 U.S. at 384), and in proceeding instead as though all "religious organizations"—whether pervasively sectarian or not—are the same. That failure infects its analysis of both the facial and as-applied challenges to the statute.

Preliminary, we note that the district court recognized no clear analytical distinction between facial and as-applied challenges under the Establishment Clause (J.S. App. 4a). It concluded (*ibid.* (emphasis in the original)) that even if a "*possible* application [ ]" of the statute is "the only constitutionally offensive element to which the court has pointed," a court is nevertheless obligated to "strike down the statute on its face."

That method of examining a statute on its face, which the district court acknowledged (J.S. App. 4a) to be "different from that usually employed when considering constitutional claims," cannot be squared with this Court's explanation in *United States* v. *Salerno,* No. 86-87 (May 26, 1987), slip op. 5, that in mounting a facial challenge to a legislative Act, "the challenger must establish that no set of circumstances exists under which the Act would be valid." Cf. *City Council* v. *Taxpayers for Vincent,* 466 U.S. 789, 800 & n.19 (1984); *New York* v. *Ferber,* 458 U.S. 747, 773 (1982); *Hoffman Estates* v. *Flipside, Hoffman Estates,* 455 U.S. 489, 494 & n.5 (1982). Applying the appropriate standard, the AFLA is plainly constitutional on its face. Since the AFLA does not, on its face, require or suggest that the religious organizations participating in AFLA programs must be pervasively sectarian, one cannot simply assume that the Secretary will exercise his discretion to involve such groups in the program or that funds will be expended in an impermissibly religious manner. Without such an unwarranted assumption, the district court lacked any legitimate basis to find the statute invalid on its face.



The district court's "as applied" examination of the actual grantees fares no better, for here again the court neglected to determine whether individual grantees are pervasively sectarian.[24] The court began, instead, with the mistaken premise that all religious organizations are essentially the same. It casually asserted that "[t]he character and purpose of 'religious organizations' is self-evident. The definition of 'religious organizations' so clearly means organizations with a religious character and purpose that 'one would necessarily need to consult a lawyer to effectively misconstrue it.' " J.S. App. 40a (citation omitted).[25] With that all-embracing premise, the court apparently barred participation in the AFLA of all organizations with any religious identification or association, however remote. Compare *Hunt* v. *McNair,* 413 U.S. at 746-747 n.8 ("formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause").

This cursory as-applied approach ignores the wide diversity in American religious life. See Note, *Developments in the Law—Religion and the State,* 100 Harv. L.

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[24] We believe that the district court erred when it held (J.S. App. 8a-12a) that appellees have standing as federal taxpayers to challenge the statute as applied. Under this Court's decision in *Valley Forge Christian College* v. *Americans United For Separation of Church & State, Inc.*, 454 U.S. 464 (1982), appellees' as-applied challenge fails because it is not " 'made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare' " (454 U.S. at 479, quoting *Flast* v. *Cohen,* 392 U.S. 83, 103 (1968)), but rather is made to decisions by the Secretary about how to spend appropriated funds. Just as the plaintiffs in *Valley Forge* lacked standing to challenge "a decision by HEW to transfer a parcel of federal property" (454 U.S. at 479 (footnote omitted)), so, too, do appellees lack standing to challenge the individual spending decisions made by the Secretary in implementing the AFLA.

[25] At the oral argument on the government's Rule 59(e) motion seeking clarification of the meaning of "religious organizations" for

Rev. 1606, 1613 (1987). Religious organizations vary in structure, purpose, degree of affiliation, and commitment to a theological regime. They range in nature and mission from churches and parochial schools, whose functions include the propagation of religious doctrine, to social welfare organizations, which provide aid to the needy in a secular setting, without regard to religious orientation, and which are operated by professional staffs bound by ethical standards that preclude religious inculcation.

Largely for that reason, this Court has held that in order "[t]o answer the question whether an institution is so 'pervasively sectarian' that it may receive no direct state aid of any kind, it is necessary to paint a general picture of the institution, composed of many elements" (*Roemer*, 426 U.S. at 758). The Court has steadfastly refused to "strike down an Act of Congress on the basis of a hypothetical 'profile' " of the " 'typical sectarian' institution" (*Tilton* v. *Richardson*, 403 U.S. at 682). Instead, the Court has insisted that account be taken of a wide range of characteristics, including formal affiliation (*Roemer*, 426 U.S. at 755), institutional autonomy (*ibid.*; *Tilton*, 403 U.S. at 680), curriculum (*Roemer*, 426 U.S. at 756), hiring policies (*Roemer*, 426 U.S. at 757; *Hunt*, 413 U.S. at 743-744), source of program participants (*Roemer*, 426 U.S. at 757-758; *Hunt*, 413 U.S. at 743-744), and symbolic representations (*Tilton*, 403 U.S. at 680). Because the as-applied inquiry is intensively factual, the Court has explained that "[i]ndividual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these [pervasively sectarian] characteristics" (*ibid.*). The district

purposes of the injunction, the district court insisted that it was "not going to get * * * in th[e] game" of "defin[ing] what constitutes a religion or religious organization" (8/11/87 Tr. 35-B). The court invited counsel to "go do the research" on what "religious organizations" means for purposes of the order, noting that "[t]here are a multitude of statutes and regulations that define what that constitutes" (*id.* at 36, 41).



court's concept of a "religious organization," which requires no "more than a formalistic church relationship" (*Hunt* v. *McNair*, 413 U.S. at 746-747 n.8), cannot be sustained.[26]

Moreover, in the several instances in which the court at least inquired into the sectarian nature of a particular grantee, it made obvious legal and factual errors.[27] It faulted St. Ann's Infant and Maternity Home, for example, because its affiliation with the Catholic Archdiocese prohibits it from "counsel[ing] or refer[ring] patients for abortions" (J.S. App. 34a). The court likewise found Family of the Americas Foundation an inappropriate grantee, because it was "inspired" by a religious doctrine opposing abortion (*id.* at 35a). But the statute itself imposes the same restriction on the funded programs (see 42 U.S.C. 300z-3(b)(1), 300z-10(a)), and it is hard to see why grantees that obey the restrictions on abortion services have impermissibly promoted religion, merely because the grantees are agreeable to the restrictions by virtue of their religious beliefs.[28]

The court also noted that in certain cases AFLA grantees had conducted programs "on sites adorned with religious symbols" (J.S. App. 36a). But while some grantees did hold occasional community outreach pro-

[26] Unfortunately, the present record does not now permit such an individualized analysis, because all but one of the religiously-affiliated groups analyzed by the district court are no longer receiving federal funds.

[27] Although appellees submitted evidence with respect to 23 AFLA grantees, and the Secretary offered evidence with respect to 60 grantees, the district court, stating that it would "not engage in an exhaustive recitation of the record" (J.S. App. 33a), focused on no more than a handful of the funded programs (see *id.* at 33a-38a).

[28] The court's treatment of St. Margaret's Hospital is flawed for the same reason, for it is not at all clear why a facility that is "committed to acting 'in harmony with the teaching of the Catholic Church' " (J.S. App. 33a) will advance religion in a manner not contemplated by the purely secular restrictions dictated by the statute.

grams at local churches and parochial schools, the same grantees also held meetings at public schools and in other secular settings (J.A. 455, 456, 485, 576). Taken as a whole, these particular programs did not have the primary effect of advancing religion, simply because they involved some outreach sessions that were conducted in local religious facilities.[29] The Court's decisions make clear that not all association between publicly sponsored activities and religious symbolism or references must be avoided. *E.g., Lynch* v. *Donnelly,* 465 U.S. 668 (1984) (creche); *Marsh* v. *Chambers,* 463 U.S. 783 (1983) (opening prayer in state legislature); Cf. *Tilton,* 403 U.S. at 681. Rather, such symbolism is, at most, a factor for a court to consider in evaluating the pervasively sectarian nature of the institution involved. See *Lemon* v. *Kurtzman,* 403 U.S. at 615-616.

2. Even in the absence of a finding of assistance to a pervasively sectarian organization, a court must strike down a program of governmental aid where it is channeled

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[29] In granting summary judgment in appellees' favor, the district court essentially overlooked our submissions of material facts, finding that we had failed to follow the procedural formalities of Fed. Dist. Ct. Local R. 108(h). That rule requires the moving party to file a statement of material facts with its memorandum of points and authorities. The opposing party may then file an opposition, setting forth facts as to which there is a genuine dispute. Both sides in this case moved for summary judgment and both submitted multi-volume statements of material facts, memoranda in support, and oppositions. We are unable to discern a meaningful difference between the two sides' papers, and thus we cannot fathom the district court's apparent unwillingness to consider the facts that we submitted.

We also believe that while ordinarily the court's quite arbitrary reliance on perceived technical pleading irregularities would not raise an issue for this Court's consideration, where, as here, the constitutionality of an Act of Congress is at issue, these supposed irregularities should not preclude this Court's consideration and undermine its mandatory appellate jurisdiction.



to "a specifically religious activity in an otherwise substantially secular setting" (*Hunt* v. *McNair,* 413 U.S. at 743). The district court made no such inquiry in this case, however, having already invalidated the statute under its novel "direct and immediate" test. No such finding could have been made in any event. By its terms, the statute provides support for demonstration projects that provide care or prevention services (42 U.S.C. 300z-3(a)(1)). The projects involve such facially neutral services as "pregnancy testing" (42 U.S.C. 300z-1(a)(4)(A)), "adoption counseling and referral services" (42 U.S.C. 300z-1(a)(4)(B)), "prenatal and postnatal care" (42 U.S.C. 300z-1(a)(4)(C)), and referrals to pediatric, mental health, residential care, or maternity home services (42 U.S.C. 300z-1(a)(4)(F), (I) and (J)). The Secretary has also taken pains to ensure that AFLA funds are used only for the secular objects mandated by the statute, and includes in the grant awards a careful proscription against engaging in religious activity (see J.A. 757, 759, 761). And, where appropriate, the Secretary has acted to eliminate departures from the secular terms of the grant by individual grantees (see p. 41, *infra*).

The district court noted (J.S. App. 27a-28a) that several of the services funded under the AFLA involve "education" or "counseling" of adolescents. This Court's cases, however, do not permit the presumption—implicitly indulged by the district court—that all religiously affiliated organizations are incapable of carrying out such functions in a lawful, secular manner. In *Roemer* v. *Maryland Pub. Works Bd.,* 426 U.S. 736 (1976), for example, a plurality of the Court upheld noncategorical grants to colleges, among them religiously affiliated colleges, under a statute that simply stipulated that none of the funds could be used for sectarian purposes (*id.* at 755-758). In light of the statutory proscription, the Court was unwilling to assume (as the district court did in the present case) that the recipients would use the funds to promote " 'specifically

religious activity' " (*id.* at 759 (quoting *Hunt* v. *McNair*, 413 U.S. at 743)). The Court emphasized in *Roemer* that it "must assume that the colleges * * * will exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate" (426 U.S. at 760). And in marked contrast to the approach taken by the court below, the Court cautioned (*id.* at 761) that "[i]t has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds." Accord *Tilton* v. *Richardson*, 403 U.S. at 682.[30]

The district court also noted (J.S. App. 28a) that the AFLA supports education programs that touch on "matters [that] are fundamental elements of religious doctrine." But issues of public importance are frequently the subject of both secular and theological concern, and the Establishment Clause is not violated simply because a matter "happens to coincide or harmonize with the tenets of some or all religions." *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961). Accord *Lynch* v. *Donnelly*, 465 U.S. at 682;

[30] The fact that the statute itself "contains no restriction whatsoever against the teaching of religion *qua* religion" (J.S. App. 29a) does not change the analysis. First, the statute does not contemplate, let alone authorize religious inculcation. Its failure to go further and explicitly forbid conduct that would have presented a clear Establishment Clause violation at the time the statutes were enacted does not make a constitutional difference. See *Bradfield* v. *Roberts*, 175 U.S. 291 (1899).

In any event, as the district court acknowledged (J.S. App. 29a n.13), the Secretary's "Notice of Grant Award" instructs grantees that they may not use the appropriated funds to inculcate religion (see, *e.g.*, J.A. 757, 759, 761). The Secretary has also taken steps to eliminate abuses, including terminating one of the grants (see J.A. 742-743). This Court has approved administrative action as one means of policing governmental programs under the Establishment Clause (see, *e.g.*, *Tilton*, 403 U.S. at 675, 680; *Hunt* v. *McNair*, 413 U.S. at 739-740).



*id.* at 715-716 (Brennan, J., dissenting); *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983); *Harris* v. *McRae*, 448 U.S. 297, 319 (1980).

The district court professed particular concern (J.S. App. 29a-30a) about the abortion restrictions imposed by the statute, noting (*id.* at 30a) that "[i]t is a fundamental tenet of many religions" that abortion is wrong, and surmising that it is "simply unrealistic" to presume that AFLA counselors "can put their beliefs aside when counseling an adolescent" (*ibid.*). We agree that abortion is a central concern of many religious faiths. It is equally true, however, that abortion can be discussed in purely secular terms.[31] The question, in our view, is not whether abortion (or any other matter involved in AFLA services) is *capable* of being discussed in religious terms. Indeed, it is difficult to conceive of any issue addressed by government or society at large that it not susceptible to religious instruction.[32] The issue is, instead, whether a particular

[31] Compare J. Thomson, *A Defense of Abortion*, in 1 Phil. & Pub. Aff. 47 (1971); M. Tooley, *In Defense of Abortion and Infanticide, reprinted in The Problem of Abortion* 120 (J. Feinberg 2d ed. 1984); Greenawalt, *Religiously Based Premises and Laws Restrictive of Liberty*, 1986 B.Y.U. L. Rev. 245, 265-266, with *Harris* v. *McRae*, 448 U.S. at 319 (the Hyde Amendment restriction on abortion funding "is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion"); J. English, *Abortion and the Concept of a Person, reprinted in The Problem of Abortion, supra*, at 151; J. Noonan, *An Almost Absolute Value in History, reprinted in The Problem of Abortion, supra*, at 9; S. Bok, *Ethical Problems of Abortion, reprinted in The Problem of Abortion, supra*, at 188.

[32] Arguments rooted in religious belief have been advanced in connection with such varied issues as nuclear deterrence (see, *e.g.*, J. Cameron, *Is Nuclear Deterrence Moral?*, in 34 N.Y. Rev. of Books 38-43 (Nov. 5, 1987)); foreign affairs (see J. Benestad & F. Butler, *Quest for Justice: A Compendium of the United States Catholic Bishops on the Political and Social Order, 1966-1980* (1981) (cited in A. Reichley, *Religion in American Public Life* 290 (1985)); and domestic policy (see *ibid.*).

participant in a governmental program must be presumed to be *unable* to convey that subject in lawful, secular terms. Outside the context of a pervasively sectarian institution, there is no authority in this Court's cases for presuming that religiously affiliated organizations will deliver otherwise secular services in a manner that makes them specifically religious.

3. Instead of inquiring whether AFLA funds have been used to endow "pervasively sectarian" institutions or to support "specifically religious activities," the district court applied a test of its own making. It stated that whenever "the connection between religion and the challenged government statute or practice is clear from the face of the statute," the court need only determine whether that statute has the "direct and immediate" effect of advancing religion (J.S. App. 25a).

This approach is entirely unprecedented. None of the cases relied on by the district court announce any such departure from the *Hunt* standard.[33] And while this Court has referred to the "direct and immediate" effect of a governmental action, it has used those terms to describe the inquiry that must be made *after* a court determines

[33] The court relied on four cases (J.S. App. 24a), but none of them is remotely on point. *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), and *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982), did not involve government grants (direct or indirect) to religious institutions, and thus the Court in those cases had no occasion to consider the *Hunt* standard for assessing primary effect. The remaining case, *Committee for Pub. Educ. and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), did involve government financial assistance to religious institutions, and struck it down on the ground (*id.* at 779-780) that its "effect, inevitably, is to subsidize and advance the religious mission of sectarian schools." The *Nyquist* case, like the three others cited by the district court, did not even advert to a "direct and immediate" test, let alone employ such a test as an alternative to considering the sectarian nature of the assisted institutions.



that the assistance in question has gone to a pervasively sectarian organization. In particular, the Court has held that even a pervasively sectarian institution may receive governmental assistance where that aid is only "incidental" and not "direct" or "substantial." See, *e.g.*, *Grand Rapids Sch. Dist.* v. *Ball*, 473 U.S. 373, 394 & n.12 (1985); *Meek* v. *Pittenger*, 421 U.S. 349, 371 n.21 (1975); *Committee for Pub. Educ. and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 771, 775 (1973). The district court simply omitted the initial step in the analysis, by invalidating direct or immediate aid to "religious organizations," without first considering whether any of them were pervasively sectarian.[34]

The district court's approach in this case implements a form of "religious gerrymander[ ]" (*Walz* v. *Tax Comm'n*, 397 U.S. 664, 696 (1970) (Opinion of Harlan, J.)), under which religious organizations are singled out for exclusion from participation in various national programs, without regard to their particular beliefs or the nature of their affiliation. The district court's reasoning would prohibit Congress from recognizing and accommodating the reality that religious organizations constitute a major portion of the private sector entities engaged in providing social services to those in need. To ensure the success of its pro-

[34] Moreover, the district court's approach—which begins by asking whether a statute explicitly refers to "religious organizations"—does not answer the relevant question under the effects test: whether "the government itself has advanced religion through its own activities and influence" (*Amos*, slip op. 8 (emphasis omitted)). That requires a much more probing inquiry of the nature and conduct of particular organizations, and cannot plausibly turn on the simple fact that the text of the statute mentions religious organizations. While a decision by a legislature to include religious organizations in the text of a statute may, in highly unusual circumstances, suggest that it lacked a secular *purpose* in passing the legislation (cf. *Wallace* v. *Jaffree*, 472 U.S. at 58-59), for the reasons stated by the district court (J.S. App. 17a-22a), no such inference may be drawn in this case. See pp. 23-25, *supra*.

grams, and in fairness to those whose religious beliefs motivate them to participate in social services, Congress must be allowed to cast its net widely, and not to exclude a vast and uniquely effective segment of the nation's charitable and social network. The court's broad rule exhibits a systematic "hostility" to religion (*Lynch* v. *Donnelly*, 465 U.S. at 673), since it bars religious organizations of all kinds from participating in the AFLA programs—regardless of whether they are grantees, sub-grantees, or non-funded participants; regardless of whether they perform a counseling function or not; regardless of whether they offer care or prevention services; regardless of the premises on which their work is done; regardless of whether their role consists of nothing more than referring troubled teenagers to funded programs elsewhere; and regardless of how faithfully they have previously discharged the secular purposes of the statute. That hostility offends the First Amendment, for just as the government may not endorse or exhibit a preference for a particular religion, or for religion in general (*Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)), neither may it diminish one's "standing in the political community" on account of religious belief (*id.* at 687). See *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952); *Illinois ex rel. McCollum* v. *Board of Educ.*, 333 U.S. 203, 211-212 (1948). Moreover, a policy that invites the participation of private organizations generally, but advises that religious organizations "need not apply," would raise serious equal protection issues. See *Widmar* v. *Vincent*, 454 U.S. 263, 274-275 (1981); *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. at 746 n.13.

4. We do not contend that there were no departures from proper constitutional principles in individual AFLA programs. The district court correctly found (J.S. App. 36a-37a) that Catholic Charities of Arlington held AFLA classes in religious settings and that its inclusion of religious discussions at the conclusion of otherwise secular AFLA programs raises serious concerns. In another case, a grantee (SUMA) proposed to "include[ ] 'spiritual counseling' in its AFLA program" (*id.* at 36a), while another grantee (St. Margaret's) did at one point use curricula that "included explicitly religious materials" (*ibid.*).



Such departures are not representative of the many different programs funded under the AFLA, including those in which religious organizations participated. And these departures do not justify a holding that the AFLA is unconstitutional when applied to the larger number of programs that were in full compliance with the law. Still less do they warrant a finding that the Act is invalid on its face. "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." *Tilton* v. *Richardson*, 403 U.S. at 679. In *Tilton* the Court found it sufficient that the statute directed that funds be used for secular purposes only; and while in *Tilton*, as here, departures had apparently taken place, the Court was satisfied that "the record show[ed] that some church-related institutions ha[d] been required to disgorge benefits for failure to obey" the restrictions on the grant (*id.* at 680).

Finally, where there were departures from proper constitutional practice, they were met by firm action by the Secretary. The Secretary terminated the Arlington program, advised SUMA that its counseling program was "not legally permissible" and should be revised accordingly, and notified St. Margaret's that it must eliminate religious material from its program because "teach[ing] or promot[ing] the views of a particular religion is impermissible under the First Amendment" (see J.A. 517-519, 675-676, 742-743).

### C. The AFLA Does Not Foster Excessive Entanglement With Religion

In *Lemon* v. *Kurtzman*, 403 U.S. at 615, this Court observed that "[i]n order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." In subsequent cases, the Court has made clear that the first factor—the nature of the institution—is critical to the inquiry. Indeed, to our knowledge, the Court has never found excessive entanglement where the recipient of governmental funds was not a church or a parochial school. Because the district court here steadfastly refused to focus on the nature of the specific institutions involved, or to recognize any distinctions among the types of "religious organizations" that may participate in AFLA programs, it misapplied the entanglement doctrine.

1. This Court first applied the entanglement doctrine in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), striking down Rhode Island and Pennsylvania programs that reimbursed parochial schools for the cost of teacher salaries and related educational expenses. The Court noted at length (*id.* at 615-616, 620) the features of the respective schools that posed a "grave potential for excessive entanglement" (*id.* at 615). The Rhode Island schools were "located close to parish churches"; contained "identifying religious symbols"; maintained "religiously oriented extracurricular activities"; drew two-thirds of their teachers from various religious orders; and, in general, "constituted 'an integral part of the religious mission of the Catholic Church' " (*id.* at 615-616). The Pennsylvania schools were likewise "controlled by religious organizations, ha[d] the purpose of propagating and promoting a particular religious faith, and conduct[ed] their operations



to fulfill that purpose" (*id.* at 620). Moreover, the aid in question involved teachers, and the Court observed that while "a textbook's content is ascertainable, * * * a teacher's handling of a subject is not" (*id.* at 617). As the Court put it (*id.* at 618), "[w]e need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the * * * First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his faith or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." The central concern was thus the pervasively sectarian environment.

*Aguilar* v. *Felton*, 473 U.S. 402 (1985), the Court's most recent application of the entanglement doctrine, confirms that only in pervasively sectarian settings is the entanglement dilemma presented. In *Aguilar* the Court held unconstitutional a New York City program under which Title I educational services were provided on the premises of local parochial schools to meet the needs of educationally deprived children is such areas as remedial reading and mathematics, English as a second language, and guidance counseling. The Court noted two "critical elements" of entanglement that were present in the case. First, "the aid is provided in a pervasively sectarian environment." Second, "because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message." *Id.* at 412. As a result, the Court concluded (*id.* at 413): "This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement * * *. In short, the religious school, which has as a primary purpose the advancement and preservation of a particular religion, must endure the ongoing presence of state personnel whose

primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought."

The Court went on in *Aguilar* to note precisely why this state of affairs is unacceptable (473 U.S. at 414): "The numerous judgments that must be made by agents of the city concern matters that may be * * * of deep religious significance to the controlling denominations. * * * At the same time, 'the picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined spector of governmental "secularization of a creed."' *Lemon* v. *Kurtzman,* 403 U.S. at 650 (opinion of Brennan, J.)."

Where institutions are not pervasively sectarian, on the other hand, the entanglement concerns articulated by the Court are unwarranted. The Court has routinely rejected entanglement claims in such cases. See, *e.g., Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. 736 (1976); *Hunt* v. *McNair,* 413 U.S. 734 (1973); *Tilton* v. *Richardson,* 403 U.S. 672 (1971). See also *Wolman* v. *Walter,* 433 U.S. 229, 246-248 (1977). Two factors may explain those different results.

First, where the grantee is not pervasively sectarian, it cannot be said that surveillance by the government (to ensure compliance with the terms of the grant) is an "intrusion * * * into the precinct[]" of the Church (*Lemon,* 403 U.S. at 614).[35] Where no pervasively sectarian grantee is involved, the government's monitoring of the grantee is just that—monitoring—precisely the sort of supervision

[35] As the Court put the matter in *NLRB* v. *Catholic Bishop,* 440 U.S. 490, 501 (1979), "[t]he key role played by teachers in * * * a [church-operated] school system has been the predicate for our conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools."



that the government exercises in its many other grant programs. See *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. at 764.

Second, where the recipient of government funds is not pervasively sectarian, there is also a sharply reduced basis for presuming that the grantee will violate the terms of the grant by inculcating religious doctrine. A plurality of this Court made that point in *Roemer* v. *Maryland Pub. Works Bd., supra.* It observed that the institutions in question, while religiously affiliated, were not pervasively sectarian and concluded that that factor was "important for purposes of the entanglement test because it means that secular activities, for the most part, can be taken at face value. There is no danger, or at least only a substantially reduced danger, that an ostensibly secular activity * * * will be infused with religious content or significance. The need for close surveillance of purportedly secular activities is correspondingly reduced" (426 U.S. at 762). Accord *Tilton* v. *Richardson,* 403 U.S. at 687.[36]

2. In deciding the entanglement question in this case, the district court did not consider whether the AFLA grantees (or any one of them, for that matter) are pervasively sectarian. It was enough for the court that "religious organizations"—broadly defined to include af-

[36] The Court in *Hunt* v. *McNair,* 413 U.S. 734 (1973), suggested (*id.* at 747-749) that, apart from the sectarian nature of the grantees, there might be a separate entanglement problem if the government "bec[a]me deeply involved in the day-to-day financial and policy decisions" of a religiously affiliated grantee. We know of no case, however, in which the Court has upheld an entanglement claim in the absence of a finding that the recipient of government funds was a pervasively sectarian institution. And the decision in *Aguilar* confirms (473 U.S. at 412) that the presence of a pervasively sectarian setting is one of the two "critical elements" of a finding of excessive entanglement. Accord *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. at 764-765.

filiated institutions of all stripes – were participants in the programs and that education and counseling activities were involved. But this Court has always begun its inquiry by examining the nature of the particular entities involved in the program, and it has never found a grant program impermissibly entangling where a grantee, although religiously affiliated, was not pervasively religious. The district court's failure to make any finding about the sectarian nature of the many types of "religious organizations" involved in the AFLA programs requires that its judgment be reversed.[37]

## CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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[37] Even if there might be entanglement problems in cases of some religious organizations that are not pervasively sectarian, plainly the degree of religious affiliation is highly relevant to the entanglement inquiry. See, *e.g.*, *Aguilar*, 473 U.S. at 412. By failing to make any judgment at all on the issue, the district court simply did not come to grips with the entanglement doctrine as this Court has articulated it.

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